

1 **UNITED STATES DISTRICT COURT**
2 **NORTHERN DISTRICT OF OHIO**
3 **WESTERN DIVISION**

3 **UNITED STATES OF AMERICA,** - Case No. 3:03-CR-739
4 Plaintiff - Toledo, Ohio
5 - vs - - December 20, 2004
6 - **Sentencing**
7 **JAMES W. WHEELER,** -
8 Defendant. -
9 - - - - -

8 **TRANSCRIPT OF SENTENCING HEARING**
9 **BEFORE JUDGE DAVID A. KATZ**

10 **APPEARANCES:**

11 For the Government:

12 **JOSEPH R. WILSON, Esq.**
13 **AVA M. ROTELL-DUSTIN, Esq.**
14 Asst. U.S. Attorneys
15 Four Seagate, Third Floor
16 Toledo, OH 43604
17 (419) 259-6376

18 For Defendant James L. Wheeler:

19 **JEFFREY J. HELMICK, Esq.**
20 1119 Adams Street, 2nd Floor
21 Toledo, OH 43624-1508
22 (419) 243-3800

23 **DAVID L. DOUGHTEN, Esq.**
24 4402 St. Clair Avenue
25 Cleveland, OH 44103-1125
 (216) 361-1112

 Court Reporter: **Tracy L. Spore, CRR, RMR**
 1716 Spielbusch Avenue
 Toledo, Ohio 43624

 Proceedings recorded by mechanical stenography.
 Transcript produced by computer-aided transcription.

10:12:10

10:12:10 1 (Commenced at 12:22 p.m.)

12:22:38 2 MR. WILSON: The next matter is the
12:22:40 3 sentencing of Mr. James Wheeler pursuant to the trial
12:22:44 4 conviction last June. The defendant was referred for a
12:22:48 5 presentence investigation. They have prepared that
12:22:50 6 report. The government has reviewed that report, finds
12:22:52 7 no inaccuracies either as to the factual content or the
12:22:56 8 guideline calculations. We're prepared to proceed with
12:22:58 9 sentencing.

12:23:00 10 THE COURT: Thank you. I know that there
12:23:06 11 are several issues to be discussed by both the
12:23:10 12 government and addressed by the defendants on behalf of
12:23:14 13 Mr. Wheeler. I think that there are three or four
12:23:26 14 issues at least. I would like to suggest that
12:23:32 15 logically they be considered and discussed in the
12:23:36 16 following order: First, the criminal history; second,
12:23:42 17 the implication of Section 841(b); third, role in the
12:23:52 18 offense; and fourth, Section 851 and the necessity or
12:24:02 19 the lack thereof with respect to prior convictions.

12:24:10 20 Any objection to handling these matters in
12:24:12 21 that fashion?

12:24:14 22 MR. WILSON: No, Your Honor.

12:24:16 23 MR. DOUGHTEN: No, Your Honor.

12:24:18 24 THE COURT: I'd like the government first to
12:24:18 25 address the criminal history issues.

12:24:22 1 MS. DUSTIN: Yes, Your Honor. In looking
12:24:24 2 at the report, as it sets forth, the defendant's
12:24:28 3 criminal history category, at paragraph 11, 111, on page
12:24:36 4 26 of the report, the report states that the defendant
12:24:40 5 has a total criminal history points of three, and
12:24:44 6 therefore is a criminal history category 2. The
12:24:46 7 government disagrees in certain respects with that
12:24:50 8 computation. First, looking at paragraph 92, the
12:24:54 9 defendant was convicted of possession of marijuana and
12:24:58 10 possession of LSD in 1972 and was released from parole,
12:25:02 11 after serving a sentence, in 1975.

12:25:08 12 THE COURT: Excuse me. Do I have the same
12:25:12 13 report as you?

12:25:16 14 MS. DUSTIN: I'm looking at the report that
12:25:18 15 was dated December 9.

12:25:28 16 THE COURT: I'm looking at a report dated
12:25:30 17 August 26. The pagination is different.

12:25:56 18 Excuse me.

12:25:58 19 MS. DUSTIN: I can use the August report if
12:26:00 20 you prefer.

12:26:04 21 THE COURT: I have the other ones.

12:26:06 22 Mr. Sturdivant, were there any revisions
12:26:08 23 which would implicate the issues I just stated that are
12:26:12 24 necessary?

12:26:12 25 MR. STURDIVANT: Yes, Your Honor. Let me

12:26:18 1 point them out to you.

12:26:26 2 THE COURT: Excuse us just a minute.

12:26:28 3 (Discussion had off the record.)

12:27:26 4 THE COURT: The paragraph numbers are
12:27:28 5 different, and the conclusion with regard to criminal
12:27:30 6 history is where we had discussed in chambers with all
12:27:34 7 counsel present, and that conclusion was that it was
12:27:38 8 criminal history six. I couldn't understand a prior
12:27:42 9 draft showing a criminal history two. Please now
12:27:46 10 proceed.

12:27:50 11 MS. DUSTIN: At paragraph 92 the report
12:27:52 12 assesses zero criminal history points for the
12:27:54 13 defendant's conviction of possession of marijuana and
12:27:56 14 possession of LSD in 1972.

12:27:58 15 It's the government's position the defendant
12:28:02 16 should be assessed three criminal history points for
12:28:04 17 this conviction because the conviction would actually be
12:28:08 18 within 15 years of the defendant's conduct in the
12:28:14 19 instant case since Gus Macropoulos testified that the
12:28:18 20 defendant's drug distribution with him began in 1989.
12:28:22 21 Therefore, counting 15 years from 1975 would place this
12:28:28 22 conviction within the 15-year window.

12:28:34 23 Turning to the criminal history conviction
12:28:38 24 at paragraph 97, the defendant's conviction in 1982 for
12:28:42 25 a violation of the firearms act. The report assesses

12:28:46 1 zero criminal history points for that conviction. It's
12:28:48 2 the government's position that the defendant should
12:28:52 3 actually receive two criminal history points for that
12:28:56 4 conviction because that also would fall within the
12:28:58 5 15-year window required under the sentencing guidelines.
12:29:02 6 The defendant was released from prison in 1982.
12:29:04 7 Counting 15 years from that date would place that into
12:29:08 8 1998, well within his offense conduct in this instant
12:29:12 9 case.

12:29:14 10 Next, looking at paragraph 103, that
12:29:16 11 paragraph assesses zero criminal history points for the
12:29:20 12 defendant's convictions in Florida in 2004 for RICO,
12:29:26 13 RICO conspiracy, and obstruction of justice. The
12:29:28 14 government presumes that the report writer did not count
12:29:32 15 that conviction feeling that it might be similar
12:29:38 16 conduct, relevant conduct to the instant offense. But
12:29:40 17 as this Court has heard, that conduct in that case was
12:29:44 18 completely separate from what the defendant was charged
12:29:48 19 with in this case, the fact this Court found that there
12:29:52 20 was no double jeopardy between the two offenses and two
12:29:56 21 cases; therefore, it's the government's position the
12:29:58 22 defendant should be assessed three criminal history
12:30:00 23 points for his conviction in Florida.

12:30:02 24 Adding all the criminal history points
12:30:04 25 together, the defendant would actually score out at 11

12:30:10 1 points and be a criminal history category five, just
12:30:14 2 looking at his convictions. However, it's still -- I'm
12:30:20 3 sorry, Your Honor; did you have a question?

12:30:24 4 THE COURT: Yes. I presume you're going to
12:30:48 5 address the career issue?

12:30:50 6 MS. DUSTIN: The career offender issue.
12:30:54 7 Just looking at the points themselves, the defendant
12:30:56 8 scores out at a criminal history five.

12:30:58 9 It's the government's position the defendant
12:31:00 10 is actually a career offender and therefore should be
12:31:02 11 treated as a criminal history category six. The
12:31:06 12 defendant does, in fact, have a prior conviction for a
12:31:10 13 drug offense, possession of marijuana, and possession of
12:31:12 14 LSD from 1971 that when you look at the 15-year window,
12:31:16 15 it now counts towards the criminal history. And also
12:31:18 16 looking at the defendant's convictions in Florida from
12:31:22 17 2004, he was convicted of RICO and RICO conspiracy. A
12:31:28 18 number of predicate acts that were charged in the RICO
12:31:32 19 case concern bombings. The defendant was, in fact,
12:31:36 20 found guilty of those predicate acts; and therefore,
12:31:40 21 this Court should treat that conviction as an offense of
12:31:44 22 violence. He would therefore have both predicate acts
12:31:46 23 required under the guidelines and should be treated as a
12:31:50 24 career offender, which would start his base offense
12:31:52 25 level at, rather than a base offense level of 36, a base

12:31:58 1 offense level of 37. Adding four levels to that for
12:32:02 2 leader or organizer would bring him to a base offense
12:32:06 3 level of 41, and a criminal history category of six,
12:32:10 4 scoring out at a total of 360 months to life under the
12:32:14 5 sentencing table.

12:32:54 6 THE COURT: Mr. Doughten or Mr. Helmick?

12:32:56 7 MR. HELMICK: Your Honor, with regard to
12:32:58 8 these issues, taken in the order discussed, first with
12:33:02 9 regard to 92, Your Honor, that enhancement. With
12:33:06 10 regard to all these, Judge, I guess we'd pose a general
12:33:08 11 objection based upon Blakely and its progeny and just
12:33:14 12 simply indicate in our argument at this point the
12:33:18 13 Supreme Court hasn't specifically addressed this, that
12:33:20 14 such enhancements for sentencing for criminal
12:33:24 15 convictions should be decided by a jury. So we put that
12:33:28 16 on the record after any enhancements of this nature
12:33:30 17 discussed by the government.

12:33:30 18 With regard to Number 92, I offer to the
12:33:34 19 Court, I think the testimony was less than clear in
12:33:36 20 terms of the time line of initiation of the conspiracy
12:33:40 21 testimony from this case. And accordingly, since the
12:33:44 22 defendant was released from parole in March of 1975,
12:33:48 23 it's simply too close, and that the Court ought to give
12:33:52 24 the defendant the benefit of the doubt by not imposing
12:33:54 25 the assessment with regard to paragraph 92.

12:33:58 1 Judge, with regard to paragraph 97, we have
12:34:00 2 nothing other than our general objection based on
12:34:02 3 Blakely and our right to jury determination.

12:34:06 4 With regard to the Florida conviction, Your
12:34:08 5 Honor, paragraph 103, I suppose we'd offer, in addition
12:34:14 6 to the general objection, just because the Court found
12:34:18 7 that there was no constitutional bar under the Fifth
12:34:22 8 Amendment to secondary prosecution does not mean there
12:34:24 9 was not overlap in conduct and events between Florida
12:34:28 10 and here. In fact, I think we know there was. So I
12:34:32 11 respect the Court's determination with regard to double
12:34:34 12 jeopardy; I'd suggest to the Court for purposes of
12:34:38 13 enhancement that the Court ought to consider Florida and
12:34:42 14 the similarity and events and conduct and overlapping
12:34:46 15 conduct between the two. I think it would be
12:34:48 16 inappropriate to assess any additional criminal history
12:34:52 17 points with regard to paragraph 103 and the defendant's
12:34:54 18 conviction in Florida.

12:35:00 19 That's all we have at this time, Your Honor.

12:35:04 20 THE COURT: Thank you very much. I'd like
12:35:06 21 to rearrange my order and address role in the offense
12:35:12 22 next.

12:35:16 23 MS. DUSTIN: Your Honor, the report
12:35:16 24 recommends an assessment of four levels with regard to
12:35:20 25 Mr. Wheeler. We believe that that is commanded by the

12:35:24 1 terms of the guidelines and the reference in the
12:35:28 2 guidelines to assessing an additional four levels for
12:35:32 3 those persons who can clearly be shown to have managed,
12:35:36 4 to have led, and to have otherwise supervised five or
12:35:40 5 more persons. It is very clear within the scope of the
12:35:42 6 drug operation alone that Mr. Wheeler was involved in
12:35:46 7 there were over five people involved in that. And
12:35:48 8 there is no question that Mr. Wheeler stood in a
12:35:50 9 supervisory capacity. In that particular sense, the
12:35:56 10 Court may well recall numerous members of the Outlaws
12:35:58 11 who came in here and testified that had -- at Mr.
12:36:02 12 Wheeler's direction they obtained drugs from Mr.
12:36:04 13 Wheeler, transported those drugs to other communities
12:36:06 14 such as Sandusky, Ohio. We can recall the testimony of
12:36:10 15 Mr. Wheeler in attempting to recruit Mr. Dilts to take
12:36:12 16 part in alcohol-related -- drug trafficking activities.
12:36:16 17 So clearly and totally in the sense of a drug operation
12:36:20 18 alone, there is no question, Mr. Wheeler was a
12:36:22 19 supervisor within the context and within the meaning of
12:36:26 20 the guidelines.

12:36:26 21 Also, with respect to the enterprise itself
12:36:28 22 in this case, it is also true that Mr. Wheeler was a
12:36:32 23 manager. He occupied the position of international
12:36:34 24 president of the Outlaws. And it is also instructive
12:36:40 25 and interesting to note that within the scope of the

12:36:44 1 Outlaws, and within the scope of Mr. Wheeler's
12:36:46 2 leadership of the Outlaws, that on numerous occasions
12:36:48 3 they dealt with issues that concerned the drug
12:36:52 4 distribution activities of members of the Outlaws.
12:36:54 5 There was the infamous Cancun meeting wherein it was --
12:37:00 6 the issue was raised whether members in Canada would be
12:37:02 7 permitted to distribute certain kinds of drugs. And Mr.
12:37:06 8 Wheeler brought that issue to the table. Then, of
12:37:08 9 course, there was the ongoing discussion with regard to
12:37:12 10 methamphetamine sales, and we had tape recordings that
12:37:14 11 were played in which Mr. Wheeler indicated that that had
12:37:16 12 been discussed on the national level, and expressed some
12:37:20 13 anger with Mr. Puttick for not having taken that back to
12:37:24 14 the regions. There being more than five individual
12:37:26 15 chapters in the county, it would seem to be clear that
12:37:32 16 Mr. Wheeler supervised five or more persons. Clearly
12:37:36 17 within those chapters there were any number of members
12:37:40 18 as well.

12:37:40 19 Taking this all together, if there were ever
12:37:42 20 a case for the increase in four levels with regard to an
12:37:46 21 individual, this would be it.

12:37:50 22 MR. HELMICK: Your Honor, briefly, a general
12:37:52 23 objection based on Blakely. I think this is exactly
12:37:56 24 the type of enhancement for which the Supreme Court has
12:38:00 25 described that ought to be delivered or considered by a

12:38:04 1 jury. That was not done in the case. There was not a
12:38:08 2 specific finding by the jury in the case with regard to
12:38:10 3 Mr. Wheeler's leadership role or lack thereof in the
12:38:14 4 offense. We'll put that on the record first.

12:38:16 5 Factually, having sat here with the Court
12:38:18 6 and heard the evidence for so long, I do not have to put
12:38:20 7 out that despite various titles, this was, by way of
12:38:26 8 leadership, this struck me as disorganized crime, not
12:38:30 9 organized crime, Your Honor. And that even the Cancun
12:38:36 10 meeting and other things it is apparent that to the
12:38:40 11 extent that the Court believes the government has
12:38:42 12 established criminal conduct by Mr. Wheeler, that there
12:38:44 13 were people making side deals, cross deals, ignoring
12:38:50 14 things. And I guess I'd point out to the Court there
12:38:58 15 are probably cases where it's clear, but it ain't so
12:39:02 16 clear in this one. Thank you.

12:39:14 17 THE COURT: Well, with regard to that, with
12:39:16 18 regard to this, it would be an absolutely impossible
12:39:24 19 conclusion for me and an offense to my common sense,
12:39:32 20 after sitting through 11 weeks of trial, to conclude
12:39:40 21 that Mr. Wheeler was anything but a leader, and at that,
12:39:50 22 an ironfisted leader.

12:39:58 23 I've said this before, but after sitting
12:40:02 24 through these trials and listening to these members of
12:40:06 25 the OMC in these chapters, it reminds me of my

12:40:12 1 childhood, and the old cowboy movies. These folks
12:40:20 2 remind me of people like the Hole in the Wall Gang or
12:40:26 3 other gangs of outlaws in the west as depicted in those
12:40:32 4 class B movies. But they took it too far; they took
12:40:38 5 this seriously and imposed it on our society. I cannot
12:40:48 6 for the life of me find how anyone, having sat through
12:40:54 7 the trial, could conclude Mr. Wheeler was other than a
12:40:58 8 leader.

12:41:02 9 Now, having said this, it seems to me that
12:41:06 10 under the guidelines, most of this doesn't make any
12:41:14 11 difference. It would appear to me, for instance, even
12:41:20 12 if Mr. Wheeler were a criminal history category 36 -- or
12:41:26 13 a 2, and an offense level of 36, that the maximum under
12:41:32 14 there is 262 months under Counts 1 and 3. And if I
12:41:38 15 followed that, I will tell you, I would impose them
12:41:42 16 consecutively. That's 524 months, or 43 years plus.

12:41:56 17 We then come to Count 2, which is 20 years
12:41:58 18 consecutive.

12:42:02 19 So whether it's a 37 plus four, and a
12:42:08 20 mandatory 360 years to life as a criminal history
12:42:14 21 category six, or a 36 with a criminal history of
12:42:18 22 category two, the sentence is going to be tantamount to
12:42:24 23 life. I want to make that very clear.

12:42:28 24 Could you give me but a moment.

12:42:34 25 (Discussion had off the record.)

12:43:06 1 THE COURT: I'd like next to discuss the
12:43:08 2 implications of Section 841(b) of Title 21. It would
12:43:18 3 appear to me under that section that the jury, having
12:43:36 4 found that Mr. Wheeler was responsible for five
12:43:42 5 kilograms or more of cocaine, and 100 kilograms but less
12:43:50 6 than 1,000 kilograms of marijuana, that five kilograms
12:44:00 7 of cocaine requires under Section 841(b)(1)(A) to be
12:44:20 8 sentenced at a minimum of ten years to life. At a
12:44:34 9 maximum, if there are two or more prior convictions for
12:44:44 10 felony drug offenses, the 1971 offense and the 2003
12:44:52 11 offense in Florida, such person shall be sentenced to a
12:44:58 12 mandatory sentence of life imprisonment without release.
12:45:08 13 I'd like comment on the applicability of 841(b)(1)(A).

12:45:20 14 MR. WILSON: I know this requires us to jump
12:45:22 15 a little bit ahead of the arguments scheduled, but we
12:45:26 16 did file a notice pursuant to Section 851 based upon two
12:45:32 17 prior drug penalties that Mr. Wheeler had in 1971.
12:45:36 18 Those prior two drug felonies are sufficient to trigger
12:45:40 19 the applicability of Section 841(b)(1)(A), and thus, the
12:45:46 20 only sentence available is a mandatory term of life
12:45:50 21 without parole.

12:45:52 22 The Court has also indicated that the
12:45:54 23 conviction in Florida adds an additional conviction, and
12:45:58 24 indeed it does because there was a drug offense involved
12:46:02 25 in his conviction down there. But we have provided

12:46:04 1 notice under Section 851 with respect to two earlier
12:46:08 2 convictions, and those will do it, as well as the
12:46:12 3 additional conviction which the Court just referenced.

12:46:16 4 We do agree with the Court's analysis as to
12:46:18 5 where this leads us in terms of a maximum and only
12:46:20 6 sentence available in this case.

12:46:22 7 THE COURT: It would further seem to me that
12:46:24 8 notice having been filed utilizing prior convictions,
12:46:34 9 even though by some stretch those convictions were not
12:46:40 10 considered for criminal history category, those
12:46:44 11 convictions would be considered under 841(b)(1)(A); and
12:46:50 12 therefore, since the provisions of Section 851 of Title
12:46:58 13 21 of the United States Code were complied with, that it
12:47:02 14 leaves the Court with only a life sentence.

12:47:12 15 MR. DOUGHTEN: Your Honor, to repeat, we
12:47:16 16 filed some objections. I'm just going to go over those
12:47:22 17 for the record. First of all, we did get notice of the
12:47:24 18 enhancements. And we understand as it currently stands
12:47:30 19 that there is no requirement for the government to have
12:47:32 20 to prove prior convictions to a jury. There is a case
12:47:36 21 before the United States Supreme Court currently that is
12:47:38 22 United States versus Shepard. It is not exactly on
12:47:42 23 point; I don't want to mislead the Court. However, it
12:47:46 24 is addressing that issue peripherally. So we're
12:47:48 25 objecting obviously to keep that issue alive.

12:47:52 1 Second of all, Your Honor, I think paragraph
12:47:54 2 92, I think there's one conviction. They're both --
12:48:02 3 THE COURT: There was only one conviction.
12:48:04 4 MR. DOUGHTEN: Right. I'm not sure.
12:48:08 5 THE COURT: But there were counts within
12:48:10 6 that.
12:48:12 7 MR. DOUGHTEN: That's correct.
12:48:12 8 THE COURT: I only addressed it as one
12:48:16 9 conviction. I believe Mr. Sturdivant agrees there's
12:48:18 10 only one conviction entitled to criminal history
12:48:22 11 category points. Am I correct?
12:48:26 12 MR. STURDIVANT: Correct.
12:48:30 13 MR. DOUGHTEN: For 814 are you considering
12:48:32 14 that two prior drug offenses for life or one?
12:48:46 15 THE COURT: I think that one, under
12:48:48 16 paragraph 103, former paragraph 92, is one. I'm
12:49:06 17 looking at the wrong -- I'm sorry. I'm looking at the
12:49:10 18 wrong paragraph. I am looking at 92. 92 is only one
12:49:22 19 predicate act, if you will. And the other one, I
12:49:28 20 believe, is paragraph 103.
12:49:40 21 MR. DOUGHTEN: Yes, Your Honor. I just
12:49:42 22 wanted to make clear. Obviously we're removing our
12:49:46 23 double jeopardy argument for the --
12:49:48 24 THE COURT: I understand.
12:49:48 25 MR. DOUGHTEN: One final thing. When it

12:49:50 1 goes to amounts charged, this is kind of novel. I wish
12:49:54 2 I had some case law to defend it, but I don't. But I
12:49:58 3 want to put it on the record since we're kind of at a
12:50:00 4 new frontier on all these sentencing issues. Our
12:50:04 5 double jeopardy argument, I think the Court concluded
12:50:06 6 that these were separate acts. And I guess our
12:50:10 7 position I want to make is it's improper to aggregate
12:50:14 8 the amounts for the purposes of sentencing when, in
12:50:18 9 fact, the acts were found to be separate incidents for
12:50:22 10 the purpose of double jeopardy. So we're arguing the
12:50:26 11 amounts attributable to Mr. Wheeler have been inflated
12:50:30 12 basically for --

12:50:32 13 THE COURT: I interrupted because I only
12:50:34 14 used for sentencing the jury's finding of five kilograms
12:50:38 15 or more of cocaine. I did not use any findings of
12:50:46 16 quantity in the Florida case as relevant conduct, if you
12:50:52 17 will.

12:50:52 18 MR. DOUGHTEN: All right. Then again,
12:50:54 19 we'll just reiterate the double jeopardy issue which we
12:50:58 20 think applies in both situations. Thank you.

12:51:02 21 MR. HELMICK: I'm sorry, Judge. May we have
12:51:04 22 just one moment?

12:51:04 23 (Discussion had off the record.)

12:51:28 24 MR. DOUGHTEN: Mr. Wheeler wants me to
12:51:30 25 clarify. I think it's appropriate that I do. His

12:51:32 1 concern is -- the problem is it's agreed that a number
12:51:36 2 of witnesses who testified in Tampa, Florida also
12:51:38 3 testified here, and they testified, the argument is,
12:51:42 4 about similar instances and similar acts of conspiracy,
12:51:46 5 that there's a double counting going on, that the amount
12:51:48 6 of drugs attributed to Mr. Wheeler for sentencing
12:51:52 7 purposes in Florida are also being attributed to him for
12:51:56 8 a separate conviction here in Toledo.

12:52:00 9 THE COURT: I'm assured that is far from
12:52:04 10 correct because the only attribution was the one found
12:52:08 11 by the jury sitting in Toledo, Ohio in this federal
12:52:12 12 court. And I am looking now, as I did earlier, at the
12:52:18 13 special verdict drug quantities which were found by the
12:52:22 14 jury as I previously placed on the record, five
12:52:26 15 kilograms or more of cocaine, and 100 kilograms but less
12:52:30 16 than 1,000 kilograms of marijuana. And it is my belief
12:52:36 17 that the activities between Dayton, Fort Wayne, and
12:52:46 18 Indianapolis alone justified that conclusion.

12:52:54 19 MR. WILSON: I would also note that the drug
12:52:56 20 charges that form the basis of the Florida charges were
12:53:00 21 different than those which were involved here. They
12:53:02 22 involved -- there may have been an overlap of witnesses
12:53:06 23 who established the enterprise and Mr. Wheeler's
12:53:08 24 connection with the enterprise, but the drug conspiracy
12:53:12 25 charges in Florida were much more limited, and involved

12:53:14 1 Mr. Wheeler and his association with Mr. Pellegrini from
12:53:18 2 Detroit, as opposed to the Green Region allegations
12:53:22 3 which form the basis of this indictment.

12:53:24 4 So I know the Court has not considered any
12:53:26 5 quantities from Florida, and there is no legal way to do
12:53:28 6 so given the difference between the charges in Florida
12:53:32 7 and the charges here in Toledo.

12:53:40 8 THE COURT: Thank you. I'll now ask Mr.
12:53:44 9 Wheeler, subject to all the objections which have been
12:53:52 10 aired and reserved by your counsel, both in writing as
12:53:58 11 filed previously with this Court, and orally today, and
12:54:02 12 at the hearing which was held with respect to the double
12:54:08 13 jeopardy issue -- have you read your presentence report
12:54:16 14 and discussed it with your counsel?

12:54:18 15 THE DEFENDANT: I have.

12:54:22 16 THE COURT: Do either counsel or you, Mr.
12:54:24 17 Wheeler, have any objections to the form and content of
12:54:30 18 the presentence report except as articulated either
12:54:34 19 orally or in writing up through this hour?

12:55:08 20 THE DEFENDANT: No, I don't have any now.

12:55:10 21 THE COURT: Counsel?

12:55:12 22 MR. HELMICK: Correct, nothing beyond what
12:55:14 23 we've said here today or previously filed in the case.

12:55:16 24 THE COURT: Government?

12:55:18 25 MR. WILSON: Your Honor, I know we have no

12:55:18 1 further objections to be made. We have a few other
12:55:22 2 comments prior to the imposition of sentence.

12:55:24 3 THE COURT: I understand. This is only with
12:55:26 4 respect to the report.

12:55:26 5 I'd like to order that the report be placed
12:55:28 6 in the record under seal. Should an appeal be taken in
12:55:34 7 this case, as we all anticipate it will be, then I'll
12:55:38 8 order that counsel on appeal shall be permitted access
12:55:40 9 to the presentence report except the recommendations
12:55:48 10 section, which will remain sealed.

12:56:34 11 I want to articulate again my conclusions
12:56:38 12 with respect to the guideline range and with respect to
12:56:48 13 the criminal history category. I agree with the
12:57:00 14 government's conclusions with respect to paragraphs 92
12:57:08 15 and 97 of the presentence report and the implications
12:57:36 16 that those conclusions have on the guideline range.
12:57:44 17 That would drive it from a 36 to a 37. It is clear to
12:57:52 18 me that Mr. Wheeler was established and held himself out
12:58:02 19 as the leader of at least the Green Region, but surely
12:58:08 20 from everything that was brought forth at trial, of the
12:58:14 21 international organization known as the Outlaw
12:58:22 22 Motorcycle Club.

12:58:22 23 He would be a criminal history category six
12:58:30 24 with a guideline range of 41. As a result of four
12:58:36 25 levels for leader of the enterprise, that results in a

12:58:42 1 sentencing window of 360 months to life.

12:58:52 2 It appears as a result of our discussions
12:58:56 3 with regard to criminal history category that the
12:59:06 4 defendant, James Wheeler, would be classified under the
12:59:16 5 guidelines, the exact section being 4B1.1, as a career
12:59:32 6 offender, therefore resulting in a criminal history
12:59:38 7 category of six. As a career offender at a criminal
12:59:50 8 history category of six, I believe that's 360 to life on
13:00:04 9 Counts 1 and 3 of the indictment, and on Count 2 of the
13:00:12 10 indictment, 20 years.

13:00:22 11 Having said that, because the enhancements
13:00:30 12 and notifications with regard to prior criminal activity
13:00:40 13 were afforded to the defendant under Section 851 of
13:00:48 14 Title 21, it would therefore appear that a sentencing of
13:00:58 15 life is mandatory.

13:01:02 16 I also believe that it is clear to this
13:01:06 17 judge that even if Mr. Wheeler were a guideline of 36
13:01:16 18 and a criminal history of two, this Court would sentence
13:01:22 19 Mr. Wheeler to 262 months on Counts 1 and 3 to be served
13:01:28 20 consecutively, and 20 years consecutively on Count 2.
13:01:44 21 That's a total of in excess of 63 years.

13:01:56 22 I'll listen to both counsel for the
13:01:58 23 government, but first to counsel for Mr. Wheeler before
13:02:02 24 sentencing.

13:02:20 25 MR. HELMICK: Thank you, Your Honor.

13:02:22 1 Judge, I hate to keep renewing objections, but I guess I
13:02:28 2 will. As well as with any discussion of possible
13:02:30 3 sentences and offense levels, the Court might impose a
13:02:38 4 second sentence, and under Blakely, just to preserve the
13:02:40 5 record on that.

13:02:42 6 Judge, I'd ask the Court to consider by way
13:02:44 7 of mitigation what we believe to be the same or
13:02:48 8 substantially the same conduct overlapping from the
13:02:50 9 state of Florida from which Mr. Wheeler received a 16
13:02:54 10 and a half year sentence.

13:02:54 11 I'd ask the Court to consider some of the
13:02:58 12 health problems he's experienced more recently at his
13:03:02 13 current age of 62 years. I'd like the Court to
13:03:06 14 consider the fact that he served at times something of a
13:03:12 15 role as a peacemaker in attempting to bring rival
13:03:16 16 motorcycle clubs together to at least in some instances
13:03:20 17 be successful in reaching truces. With regard to
13:03:26 18 further activities or aggression or violence, as the
13:03:30 19 Court heard both in this case as well as what came forth
13:03:36 20 in the testimony in the Florida case.

13:03:36 21 And, Judge, I want to point out,
13:03:40 22 incidentally, and the record supports, that he has been
13:03:44 23 a good husband to Stephanie and a good father to his 13
13:03:48 24 year old son Justin. I mention that as well.

13:03:52 25 Judge, this may be premature, but I would

13:03:54 1 request a recommendation to the Bureau of Prisons for a
13:03:58 2 placement in Florida, because I believe that's where his
13:04:02 3 wife and son will be residing. And they would like to
13:04:04 4 be close to him. He, of course, would like to be close
13:04:08 5 to them.

13:04:10 6 He continues, as the Court knows, to assert
13:04:12 7 his innocence, and intends to appeal. And, Judge, we'd
13:04:18 8 like the Court to appoint, if possible, attorney Gary
13:04:22 9 Crim, C-r-i-m, out of Dayton or make a recommendation to
13:04:28 10 the Sixth Circuit. Frankly, Judge, I think the only way
13:04:30 11 to assure his appointment is probably for the Court to
13:04:34 12 do it. I'd ask the Court to consider doing that in
13:04:36 13 terms of a replacement for us, and then asking Mr. Crim
13:04:40 14 to file a notice of appeal.

13:04:44 15 THE COURT: Any objection to that, Mr.
13:04:46 16 Wheeler?

13:04:48 17 THE DEFENDANT: No, not to that particular
13:04:50 18 part of the case.

13:04:52 19 MR. HELMICK: May I have one moment, Your
13:04:56 20 Honor?

13:04:56 21 (Discussion had off the record.)

13:05:06 22 MR. HELMICK: Judge, that's all I have at
13:05:08 23 this time.

13:05:08 24 THE COURT: Mr. Wheeler, this is your
13:05:10 25 opportunity to address the Court on your own behalf if

13:05:12 1 you wish to do so.

13:05:14 2 THE DEFENDANT: The only thing that I would
13:05:14 3 like to do is I filed a pro se motion with the Court,
13:05:20 4 and in that motion I asked to be able to speak to a
13:05:24 5 public -- preferably a federal public defender because I
13:05:28 6 have issues and questions, and I don't feel that I'm
13:05:32 7 getting the answers that I need from the people that
13:05:34 8 I've been represented by or by the Court. So you
13:05:38 9 mentioned about getting a hold of Cleveland because you
13:05:40 10 didn't think they could come to Milan and talk to me.
13:05:42 11 I still would request that I be able to talk to a
13:05:46 12 federal public defender. I've got issues, and I'd like
13:05:50 13 to have some answers.

13:05:54 14 Other than that, I don't have anything.
13:05:56 15 This is beyond me.

13:05:56 16 THE COURT: I'm going to appoint Mr. Crim to
13:06:00 17 represent you on appeal, and he will be in touch with
13:06:02 18 you. And if he can't provide you the answers -- they
13:06:04 19 may not be the answers that you'd like to hear, but if
13:06:06 20 he can't provide you, then you will have an opportunity
13:06:10 21 discuss that further.

13:06:12 22 Government?

13:06:12 23 MR. WILSON: It's obviously, I think, very
13:06:16 24 clear from the evidence Mr. Wheeler operated at the
13:06:18 25 highest level of the Outlaws. It was his direct

13:06:22 1 participation and his decisions which led this
13:06:26 2 organization in so many different ways.

13:06:30 3 In looking at this particular case, it has
13:06:32 4 been said that perhaps they can't shoot straight. They
13:06:36 5 shot straight in Anderson, Indiana. They darn-near
13:06:38 6 killed a young man who was completely innocent at that
13:06:42 7 particular location. They tried to blow up a clubhouse
13:06:46 8 in Indianapolis, Indiana. There is evidence Mr. Wheeler
13:06:48 9 was directly involved in that.

13:06:50 10 They sold drugs on a massive scale which
13:06:52 11 were distributed throughout the region, and by region
13:06:54 12 now we mean the midwest, including this area.

13:06:58 13 What better fit could there be in this case
13:07:02 14 between the facts that were presented in this trial and
13:07:04 15 the RICO violation for which Mr. Wheeler was convicted,
13:07:08 16 among others? And who could be more deserving of the
13:07:12 17 ultimate penalties than somebody who used their club
13:07:16 18 affiliation, as Mr. Wheeler did in this case? And
13:07:18 19 motorcycle clubs are common, there are hundreds of them
13:07:22 20 across this country, and most of them are no more
13:07:26 21 harmful than a garden club, but in this case he chose to
13:07:30 22 use his particular club to intimidate and control others
13:07:34 23 as a way to distribute hundreds of kilograms of cocaine,
13:07:38 24 marijuana, and many other drugs.

13:07:40 25 It is interesting, and you may have seen on

13:07:44 1 their own website that the Outlaws have chosen to
13:07:46 2 say, and I quote, "The government has labelled the
13:07:48 3 Outlaws Motorcycle Club a criminal organization and all
13:07:54 4 its members as criminals simply because they are
13:07:56 5 members." How untrue. We spoke to this jury in
13:08:00 6 opening statement and in closing argument, and I don't
13:08:04 7 know how many other times, and we say now that
13:08:06 8 membership in the Outlaws or any other club is not
13:08:08 9 against the law. It's your conduct in using that club
13:08:12 10 and what you choose to do with it that may violate the
13:08:16 11 law. And the evidence in this case showed that Mr.
13:08:20 12 Wheeler in his conduct with the Outlaws very, very
13:08:22 13 clearly used his association with the club to violate
13:08:26 14 the laws and to distribute drugs on a massive scale.
13:08:30 15 He was a man of criminal leadership in this enterprise,
13:08:34 16 and he ran it in a very hands-on way. He was aware of
13:08:36 17 what was going on, both within his club and without it.

13:08:40 18 And while it might seem sophomoric that so
13:08:44 19 much of their time was directed toward what rival clubs
13:08:46 20 were doing and who might be taking over this area, who
13:08:50 21 might be involved in another area, they ended up being
13:08:54 22 matters of dead seriousness to those particular
13:08:56 23 communities because on many occasions violence resulted.
13:09:00 24 And on certain occasions shown in this particular case,
13:09:02 25 we saw innocent people that got in the way of that

13:09:06 1 particular violence.

13:09:08 2 One can only look at the indictment against
13:09:12 3 Mr. Wheeler's good friend and close associate, Harry
13:09:16 4 Bowman, and some of the allegations in his charge which
13:09:20 5 Mr. Wheeler was convicted of in Florida. The
13:09:22 6 consequences of this biker warfare were shown with great
13:09:28 7 effect where we had bombings and killings in Florida
13:09:30 8 that involved the Outlaws and other clubs.

13:09:34 9 The fact of the matter is, Your Honor, that
13:09:36 10 rather than biking and brotherhood, what we really saw
13:09:40 11 here was that Mr. Wheeler ran the Outlaws in terms of
13:09:44 12 drugs and domination. Those were the operative phrases
13:09:46 13 in terms of how he ran his particular club.

13:09:50 14 Based upon evidence in this case -- and I
13:09:52 15 believe it was fair to say that the trial in the case
13:09:54 16 was thorough, this Court gave every opportunity to the
13:09:58 17 defendant to present any fact that may bear upon this,
13:10:02 18 Mr. Wheeler had a fair trial, and now the question is,
13:10:04 19 what is a fair penalty for Mr. Wheeler's conduct? The
13:10:10 20 most serious penalty available to this particular
13:10:14 21 conduct, save, of course, capital punishment, saved for
13:10:18 22 a whole separate category of offense, next to that the
13:10:22 23 most serious penalty is life without parole. How can
13:10:24 24 that not be a fair penalty for someone who has chosen to
13:10:28 25 lead a life of crime, who has chosen through their life

13:10:32 1 to lead an organization in the manner that he has here
13:10:34 2 and perpetuate at every opportunity the selling of
13:10:40 3 drugs, and the dispensing of pain across the midwest.

13:10:44 4 In other words, Your Honor, we submit to the
13:10:46 5 Court that the life sentence, a life sentence in this
13:10:48 6 case is fair and appropriate for Mr. Wheeler. It is a
13:10:52 7 punishment that he is very much deserving of by virtue
13:10:56 8 of his conduct and his conduct only. It's not about
13:10:58 9 the Outlaws or any other group. Just an individual.
13:11:02 10 In this case the jury looked at each individual
13:11:06 11 defendant on trial, all 14 of them, and acquitted two of
13:11:08 12 them. They clearly understood what we are telling
13:11:12 13 them, that it wasn't about the club; it was about the
13:11:14 14 person. And this person should be in prison for the
13:11:16 15 rest of his life. Thank you, Your Honor.

13:11:44 16 THE COURT: Clearly I did not need to be
13:11:58 17 reminded by all counsel who spoke, and I don't mean this
13:12:04 18 unkindly to anyone, of that which was made very clear
13:12:08 19 through two trials involving the defendants in this
13:12:16 20 indictment who went to trial. And I have said often
13:12:30 21 from this bench and other venues that most judges, this
13:12:36 22 one included, take no pleasure in imposing sentences.
13:12:50 23 But the impact which this defendant had on the lives of
13:12:54 24 so many others, both directly and indirectly, drives me
13:13:00 25 to a conclusion from which I can't escape. This case

13:13:06 1 has given me significant opportunity to reflect on the
13:13:12 2 law, vis-à-vis the influence for evil one person can
13:13:20 3 have on so many others.

13:13:26 4 While you, Mr. Wheeler, alone did not create
13:13:32 5 an atmosphere of disrespect for the law, you perpetuated
13:13:40 6 and enlarged upon a culture within the Outlaw Motorcycle
13:13:46 7 Clubs which venerated disdain for the rule of law, and
13:13:52 8 replaced it with its antithesis, a rule of crime, fear,
13:14:04 9 and violence. Your clubs and a few like them turn what
13:14:12 10 was and is a legitimate purpose for clubs, brotherhood
13:14:20 11 based on a commonality of interest in motorcycling, into
13:14:26 12 that which is cast appall over the cycling word, at
13:14:30 13 least in the eyes of those outside that world.

13:14:42 14 I understand from counsel their view that
13:14:46 15 your participation in an attempt to bring -- or among
13:14:54 16 rival motorcycle gangs, and that's the operative word,
13:14:58 17 gangs, may be a factor for me to consider. But those
13:15:08 18 clubs were gangs. Your efforts to eliminate conflict
13:15:16 19 between those gangs did not mean that you were making an
13:15:24 20 effort to abandon the criminal enterprise which you
13:15:30 21 directed.

13:15:30 22 Likewise, it is clear to me from what I have
13:15:40 23 seen and heard that you, when opportunity was there,
13:15:48 24 were a good husband and father to your wife and son
13:15:54 25 respectively. But I can find no reason which validly

13:16:12 1 would give me pause to consider a downward departure.

13:16:26 2 Pursuant to the Sentencing Reform Act of
13:16:28 3 1984, it is the judgment of this Court that the
13:16:30 4 defendant James L. Wheeler is hereby committed to the
13:16:36 5 custody of the Bureau of Prisons to be imprisoned for
13:16:40 6 life.

13:16:42 7 Based upon my review of his financial
13:16:44 8 condition as outlined in the presentence report, I find
13:16:48 9 that the defendant does not have the ability to pay a
13:16:52 10 fine, and will waive a fine in this case. The
13:16:54 11 defendant shall pay the United States a special
13:16:58 12 assessment of \$300 which is due and payable immediately.

13:17:06 13 As I said earlier, I've considered this case
13:17:10 14 both under the guidelines and clearly under Title 18,
13:17:14 15 Section 3553 of United States Code. I have seriously
13:17:24 16 considered the nature and circumstances of the offenses
13:17:30 17 with which this Defendant was charged and those which a
13:17:36 18 jury, after a very fair trial, an opportunity to be
13:17:44 19 heard, found him guilty. I've looked at what is just
13:17:50 20 punishment for that -- I can't think of another word --
13:17:56 21 evil which was created by the atmosphere permeating the
13:18:06 22 Outlaw Motorcycle Clubs under his control. And that is
13:18:10 23 the appropriate word, "control."

13:18:14 24 I believe the sentence I have just
13:18:16 25 articulated under the guidelines is clearly the sentence

13:18:22 1 I would and will give under Section 3553, and that is
13:18:32 2 life. That reflects the seriousness of the crime; it
13:18:40 3 affords protection to the public and prohibits this
13:18:44 4 defendant from further criminal activity.

13:18:54 5 Unless there is an objection to the form of
13:18:56 6 the sentence -- I realize that the defendant objects to
13:19:00 7 the sentence itself -- I will order that the sentence be
13:19:04 8 imposed as stated and recommend that the Bureau of
13:19:12 9 Prisons designate the defendant to a federal facility in
13:19:14 10 the state of Florida so as to be available to his family
13:19:22 11 for visits.

13:19:26 12 Any objection to the form of the sentence?

13:19:28 13 MR. DOUGHTEN: No, Your Honor.

13:19:30 14 MR. WILSON: No, Your Honor.

13:19:30 15 THE COURT: Then I'll order it imposed as
13:19:34 16 stated and that it be imposed immediately.

13:19:42 17 Mr. Wheeler, you can appeal your conviction
13:19:48 18 if you believe that the jury's finding of guilty was
13:19:52 19 somehow violative of your rights and/or of the law, or
13:20:02 20 if you believe there is a fundamental defect in your
13:20:06 21 case. You also have a right under the statutes to
13:20:14 22 appeal your sentence under certain circumstances,
13:20:18 23 particularly if you feel that the sentence was contrary
13:20:22 24 to law.

13:20:26 25 At the request of your counsel and with your

13:20:28 1 approval previously stated on the record, I'm going to
13:20:34 2 accept their withdrawal at this juncture as your counsel
13:20:40 3 for purposes of appeal and will appoint Mr. Gary Crim of
13:20:50 4 Dayton, Ohio as counsel for you on appeal. An appeal
13:21:00 5 is commenced by the filing of a notice of appeal with
13:21:06 6 the clerk of courts on the first floor of this
13:21:12 7 courthouse within ten days after your sentence has been
13:21:16 8 reduced to a judgment on the record. For the purposes
13:21:24 9 of filing the notice of appeal, because it happens to be
13:21:28 10 during this holiday season, should Mr. Crim not be
13:21:32 11 available to file that notice, present counsel are
13:21:38 12 authorized to file it on his behalf.

13:21:46 13 I'll order that my statement of reasons for
13:21:52 14 sentencing be provided to the Bureau of Prisons and to
13:21:56 15 the probation officer in this district.

13:22:02 16 Is there anything further from the
13:22:04 17 government.

13:22:04 18 MS. DUSTIN: Yes, Your Honor. The
13:22:06 19 government would request the judgment commitment order
13:22:08 20 in this case not be filed until after the forfeiture
13:22:10 21 hearing.

13:22:12 22 THE COURT: That request is granted, of
13:22:14 23 course, and that forfeiture hearing has been set, I
13:22:24 24 believe, for next week.

13:22:30 25 MR. HELMICK: Next Tuesday at 2:00 p.m.

13:22:32 1 THE COURT: That's the 28th of December. I
13:22:42 2 will withhold filing that until after the forfeiture
13:22:44 3 hearing has been concluded. And, of course, counsel
13:22:48 4 will continue through at least that forfeiture hearing.

13:22:54 5 MR. HELMICK: Your Honor, may I ask the
13:22:56 6 Court do a separate judgment entry with regard to Mr.
13:22:58 7 Crim's appointment for purposes of the appeal? I know,
13:23:02 8 knowing Gary, he would be anxious to come and meet Mr.
13:23:06 9 Wheeler, as time permits, sooner. Is it possible for
13:23:10 10 us to do that separate from the judgment of sentencing?

13:23:14 11 THE COURT: Yes. We'll do that
13:23:16 12 immediately. You understand ordinarily the Court of
13:23:20 13 Appeals makes those appointments. But because of the
13:23:24 14 request made, I will make that appointment. And if it
13:23:28 15 is necessary, the Court of Appeals will consider that
13:23:32 16 appointment as well.

13:23:36 17 Other than that, is there anything further
13:23:38 18 with regard to the sentence or anything else before we
13:23:42 19 adjourn?

13:23:42 20 MS. DUSTIN: No, Your Honor.

13:23:44 21 MR. HELMICK: No, Your Honor.

13:23:44 22 THE COURT: Thank you. That concludes this
13:23:46 23 hearing.

13:24:14 24 The Court was mistaken and did, in fact,
13:24:18 25 have and has reviewed in full the presentence report of

13:24:28 1 December 8, 2004, but mistakenly pulled from the file at
13:24:36 2 the beginning of this hearing the August, 2004 report.

13:24:48 3 (Adjourned at 1:24 p.m.)

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C E R T I F I C A T E

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7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled
9 matter.

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12 _____
Tracy L. Spore, RMR, CRR

Date

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